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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ANGEL VILLEGAS PACHECO,

Defendant and Appellant.

F075020

(Super. Ct. No. VCF291843)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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**INTRODUCTION**

At the conclusion of a jury trial on November 9, 2016, defendant and appellant Miguel Angel Villegas Pacheco was convicted of the first degree murder of his 14-year-

old stepson, D.G. (Pen. Code, § 187, subd. (a)).<sup>1</sup> On January 11, 2017, the trial court sentenced Pacheco to a prison term of 25 years to life.

Pacheco makes a plethora of arguments, contending (1) the case must be conditionally reversed and remanded due to alleged jury misconduct; (2) there was insufficient evidence of premeditation; (3) there was instructional error because CALCRIM. No. 521 misstates the law by describing premeditation as a decision to kill before completing the act causing death and CALCRIM No. 522 defining the law of premeditation-provocation was an incomplete statement of the law; (4) the prosecutor's theories of premeditation were also misstatements of the law and defense counsel was ineffective for failing to challenge the prosecutor's alleged misstatements; (5) the trial court misstated the law on awareness of guilt evidence in its determination of whether the killing was premeditated, leading to a directed verdict on this issue; and, (6) the sum of these errors was cumulative. We find no error and affirm the judgment.

## **FACTS**

### ***Pacheco's History with Victim***

Andrea Villegas was D.G.'s (Luke's)<sup>2</sup> mother. Luke's biological father was not involved in his life after Villegas moved to California from another state. Villegas met Pacheco in 2008. They had two children together. Pacheco moved in with Villegas in late 2009 or early 2010 and they were married in 2011. Pacheco had worked as a municipal bus driver in Visalia. In addition to driving routes in the city, Pacheco drove passengers to Sequoia National Park during the summer.

According to Luke's grandfather and aunt, Pacheco and Luke initially got along well. Villegas explained Pacheco and Luke played video games together when they first met. This changed after Villegas became pregnant with the couple's first child. Villegas

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<sup>1</sup> Unless otherwise designated, statutory references are to the Penal Code.

<sup>2</sup> The family called D.G. by his nickname, Luke.

explained that Pacheco and Luke did not have a healthy relationship. Pacheco would try to exclude Luke from family functions, isolate him from the rest of the family, and find reasons to keep him away from his mother and his siblings. Pacheco would scratch Luke's video games with keys and would close the door to Luke's room to keep it cold during the winter.

Villegas let Pacheco take over discipline of Luke for a time, but in 2010 she relieved Pacheco of this responsibility because he left bruises on Luke's arm of sufficient severity to prompt school officials to contact law enforcement. On another occasion, when Pacheco and Luke became so embroiled in a verbal argument that Luke tried to run out the front door, Pacheco grabbed him from behind and tackled him to the ground, though he did not hit him.

During a Child Abuse Response Team interview about his bruised arm, Luke explained that he had gotten into an argument with Pacheco over whether he was related to his younger half-sibling and Pacheco punched him four or five times. Villegas told Luke that Pacheco could get into trouble for hitting him. Villegas told Pacheco that if he ever hit Luke again, she would call the police. When an investigator was questioned at trial about the incident, he testified that Pacheco said during questioning that he argued with Luke over Luke not doing his chores. During the argument, Pacheco told Luke his younger half-sibling was not related to Luke and Luke replied that the half-sibling was not Pacheco's child. Pacheco admitted to the investigator this comment angered him and he hit Luke once with a closed fist.

Luke was in regular education classes but exhibited ADHD symptoms and had trouble focusing. Luke was evaluated for special education but he had a high I.Q. and did not need special education. Pacheco told family members Luke was on the autism spectrum, but no one observed Luke behave in a way consistent with autism.

Villegas took Luke to a doctor as his homework had become more difficult and he became more frustrated. The doctor prescribed ADHD medication which was helping

Luke perform his schoolwork. By the Fall semester of 2013, Luke was getting A's and B's and becoming more involved with school and friends. By November 2013, Luke had improved to the point that his doctor had begun reducing the dosage of some of his medications. Pacheco was no longer working as a bus driver and was a stay-at-home parent caring for the children. Luke was enrolled in an after-school program because Villegas was working 12-hour shifts and Luke did not want to be home when she was not there.

### ***Luke Missing***

On November 17, 2013,<sup>3</sup> Villegas left the house about 5:30 a.m. to go to work. At 1:38 p.m., she received a text message from Pacheco saying: "Please call. Boy ass." Villegas interpreted this to mean that Pacheco was having some kind of issue with Luke. Villegas called Pacheco to find out what was happening. Pacheco told her that Luke had been across the street at a neighbor's house, and they argued because Pacheco wanted Luke to come home but Luke would not. Pacheco claimed Luke was being rude to him, being an ass, and giving him a teenage attitude.

Villegas returned from work about 7:30 p.m. that evening. She did not see Luke when she got home. Pacheco told her Luke had eaten dinner, taken his evening medications early, and was asleep in bed. Villegas went into Luke's room to check on him and saw him lying in his bed mostly covered in a blanket. Villegas did not touch Luke because she did not want to wake him. It was unusual for Luke to go to bed early.

After eating dinner and putting her two younger children to bed, Villegas went to sleep that night around 9:00 p.m. Although Villegas is a heavy sleeper, she woke up during the night and heard what sounded like a piece of cardboard being dragged across the wood floor in the center of the house. Pacheco was not in bed. Villegas assumed the noise was Pacheco stoking the wood burning stove they used to heat the house. Villegas

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<sup>3</sup> Unless otherwise designated, all references to dates are in 2013.

also heard what she recognized was the noise a Swiffer mop made when the button is pushed to spray the cleaning solution. Villegas wondered why Pacheco was mopping the floor in the middle of the night, but she thought he was just “being weird again” and she eventually went back to asleep.

Sometime later, Villegas awoke again because she heard the car alarm to their van beep. She noticed one of her younger children was in bed with her. Villegas thought Pacheco was probably going to the casino, which he sometimes did in the middle of the night.

The following morning Villegas did not see Luke before she left the house at 5:30 a.m. to go to work. The battery on her cell phone was not working properly, causing her phone to shut off sometime that morning. Villegas did not get home from work until about 7:30 p.m. or so. As soon as she walked in the door, Pacheco asked her if she had heard from Luke. She had not. Pacheco told her Luke had not come home from school. Villegas plugged in her cell phone and checked her voicemail messages. Luke always called Villegas if he was going to be at school late for the after school program or football practice but she had no messages. Villegas had an automated message from the school attendance office stating that Luke had missed one or more classes that day. This concerned her because Luke never missed school.

Pacheco told Villegas he saw Luke leave for school that morning. Pacheco told her what Luke was wearing and that he took his medications before leaving the house. Villegas looked through Luke’s room and found none of his personal belongings missing. Luke did not have his wallet with his school I.D. and library card. He also left his portable gaming device behind. Villegas searched the house for Luke hoping he had come in the house when Pacheco was not looking. She also checked with neighbors to see if he was with them but he was not there. Villegas told Pacheco they needed to call the police because something was wrong; he called the police to report that Luke was missing.

Pacheco told the dispatcher that Luke was fourteen years old and had not arrived at school that day. He also told the dispatcher that Luke was autistic, bipolar, and suffered from depression, anxiety, and ADHD. Pacheco described Luke as wearing a blue hoodie, shorts, blue and gray shoes, and carrying a black backpack with red stripes.

Visalia Police Officer Thomas Higgins was dispatched to investigate the missing person report at 7:30 p.m. on November 18. Pacheco told Higgins that he saw Luke leave the house that morning and nothing seemed out of the ordinary. He explained that Luke usually left the house around 6:30 a.m. Pacheco said he believed Luke left that morning on his way to school. Pacheco explained Luke would either walk or ride his bike along the St. John's River trail to a nearby middle school. Pacheco told Higgins that when Luke left the house that morning, he was dressed as he had described to the dispatcher. Pacheco said he and Luke had an argument the previous evening about Luke staying out too late at the park. Pacheco claimed the argument was not abnormal or out of the ordinary. Luke was not found during an exhaustive, multi-day investigation and search conducted by law enforcement, family, friends, and volunteers.

### ***Discovery of Luke's Body and Autopsy***

On November 21, an off-duty Sequoia National Park employee was hiking in the park with her dog and found Luke's body on the side of the road. The body had no pulse. Luke was shoeless and covered in a blanket. The FBI participated in the investigation because the body was found on federal land.

Dr. Gary Walter performed an autopsy on Luke the next day. Dr. Walter found what appeared to be red finger marks on Luke's neck and internal bleeding consistent with manual pressure being applied to the neck without causing strangulation. There was a ligature mark on Luke's neck. Dr. Walter found that Luke's death was caused by asphyxiation from ligature strangulation. A ligature can be anything from an electrical cord to a rope. It can take a person between 30 seconds and a minute and a half to lose consciousness when the flow of oxygen to the brain is cut off. After a loss of

consciousness, there would have to be continued application of force depriving the brain of oxygenated blood for several more minutes, up to five minutes, to cause death. Luke had no alcohol in his system but tested positive for amphetamines at a level Dr. Walter considered higher than therapeutic.

Luke was fourteen years old and weighed 130 pounds when he was killed. Pacheco was 32 years old in November 2013, was five feet, eight inches tall and weighed 180 pounds.

### ***Questioning and Interrogation of Pacheco***

Pacheco and Villegas were formally and separately questioned on November 24. Detective Scott Nelson and FBI Agent Nicholas Pottratz questioned Pacheco. Two days earlier, Dr. Walter had determined that Luke was the victim of homicide by strangulation.

Pacheco said that on Sunday evening, Luke ate early, took his medications, and went to sleep before his mother came home. Once everyone had gone to bed, Pacheco said he was hungry so he drove out to an In-N-Out Burger, realized it was about to close, and then drove to Jack-in-the-Box. Pacheco then decided not to get food because he had bought food for lunch so he went home to eat there.

On Monday morning, Pacheco said he heard Luke use the restroom, go into the kitchen to grab something, and go out the front door. Pacheco did not say he saw Luke Monday morning but only heard him in the house. Nelson confronted Pacheco about his description to Officer Higgins of the clothing Luke was wearing before he left the house. Pacheco told Nelson that Higgins's report was incorrect. Pacheco confirmed that he used to drive bus routes regularly between Visalia and various points in Sequoia National Park.

Pacheco was questioned by FBI Agent Peter French at the Visalia Police Department on November 26. Pacheco was advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. Pacheco executed a form consenting to questioning.<sup>4</sup>

Pacheco explained that on the afternoon of November 17, he and Luke got into an argument that escalated into a physical altercation. Pacheco said Luke tried to punch him but he missed. Pacheco pushed Luke who then tried to kick Pacheco. Luke punched Pacheco twice before Pacheco tackled him onto the floor of Luke's bedroom. When Pacheco pinned Luke to the ground, Luke said he was going to kill Pacheco the next time he got the chance. Luke told Pacheco he did not love him, Villegas did not love him, and Pacheco would never be his dad. According to Pacheco, Luke said he was going to kill Pacheco in his sleep.

Pacheco claimed the death threat put him over the edge, so he grabbed the electrical cord from a nearby fan, looped it around Luke's neck, and pulled. Pacheco denied using his hands to strangle Luke. As Pacheco was pulling on the cord, Luke was gagging and spitting up fluid that looked like mucus. Pacheco said he wrapped the cord around Luke's neck a second time because "what [he] was doing didn't seem to be working." Pacheco admitted he did this "I guess to kill him." Pacheco also admitted he continued to pull on the cord until Luke's body went limp.

Pacheco lifted Luke's body up and placed him in his bed. He did not check Luke's pulse. Pacheco closed the door to the bedroom and went to check on the two younger children. After putting the two younger children down for a nap, Pacheco went back to check on Luke who was not moving. Pacheco sat on the couch to come up with a plan. About 45 minutes later, Pacheco went back into Luke's bedroom and arranged his body to make it look like he was sleeping normally in his bed. Pacheco

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<sup>4</sup> A video recording and a transcribed copy of the interrogation were submitted into evidence. During the interrogation, investigators referred to Pacheco as Miguel Villegas.



could tell by the purple pooling of blood on his back that Luke was dead. When the two younger children awoke from their nap, Pacheco got them a snack and played games with them while he waited for Villegas to come home.

When Villegas came home, Pacheco told her that Luke “was an ass” and they “got into it in his room.” He told her that Luke had an early dinner, took his medications, showered, and went to bed. Villegas did not go into the room to check on Luke.<sup>5</sup> Later, Pacheco opened the door to Luke’s room and told Villegas Luke was snoring, which was a lie. They put the two younger children to bed around 9:15 p.m. and stayed up until about 10:30 p.m. Villegas complained about it being cold in the house, so Pacheco got up and closed the window in Luke’s room. While he was there he smelled what he thought was either urine or feces, but he did not look to see if Luke had soiled himself. Pacheco went back to bed and stayed there until Villegas fell asleep about 11:00 p.m.

Pacheco went into the living room, turned on the television, and thought about how he was going to “get rid of his body.” Shortly before midnight, Pacheco went back into Luke’s room and he could feel that Luke’s body was stiff with rigor mortis setting in. Pacheco picked up Luke’s body and started carrying him down the hallway, but he was too heavy to carry all the way outside so Pacheco put him on the ground and dragged his body through the house and out the front door. Pacheco loaded the body into the van. He tried to conceal the body and prevent the fluids from getting all over the van.

Pacheco went back into the house and cleaned the areas where he had dragged Luke’s body, removing fluid on the floor using a squirt bottle of cleaner and a Swiffer. Pacheco went into Luke’s room and saw some fluid on one of his pillows and on his blue hoodie. Pacheco put the pillow and the hoodie, along with the sponge and mop he used to clean the floor, into a plastic grocery bag, and threw it in his garbage bin as he pulled out of the driveway. The garbage was being picked up the next morning.

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<sup>5</sup> This statement contradicts Villegas’s assertion to the contrary.

Pacheco drove around looking for a place to dump Luke's body and eventually ended up at Sequoia National Park. Pacheco drove toward the Buckeye Flat campground, which was fenced off, until he found a spot he thought would be a good place to conceal Luke's body. Pacheco dumped the body off the side of the road down a ravine. Pacheco chose this spot because it was a remote area where the body was not likely to be found for a while.

When Pacheco got back into town, he stopped to buy gas and used paper towels and windshield cleaning fluid to clean a stain on the carpet in the cargo area of the van. Pacheco returned home and went to bed about 3:17 a.m. That morning, Villegas woke up and went to work. Pacheco took care of the two children. Pacheco described it as "[j]ust a normal day." He opened the window in Luke's room and threw away the sheets on Luke's bed and flipped the mattress over. Pacheco threw away Luke's shoes, backpack, and glasses to make it appear he had gone to school.

After the interrogation, Pacheco went with investigators in a federal vehicle and guided them step by step from Visalia to where he dumped Luke's body. He ultimately led them to a dirt road near the Buckeye Flat campground in Sequoia National Park. Video surveillance footage from the entrance to Sequoia National Park showed a vehicle matching the description of Pacheco's vehicle entering the park at 1:02 a.m. on November 18 and leaving the park at 1:49 a.m.

### ***DNA Evidence***

DNA was found on the electrical cord attached to the fan seized during the search of Pacheco's home matching Pacheco and Luke. A reddish-brown stain on the carpet in the cargo area of Pacheco's van tested positive for Luke's DNA. No foreign DNA was found under Luke's fingernails.

### ***Pacheco's Testimony***

Pacheco said he had a normal relationship with Luke but it deteriorated after he and Villegas had their first child. Pacheco thought Luke was jealous of Pacheco's

relationship with the two younger children. Pacheco denied excluding Luke from family activities and said Luke was included in all of their family trips. Until 2010, Pacheco was primarily responsible for disciplining Luke. After 2010, Pacheco would wait until Villegas returned home to discuss appropriate punishment.

In 2010, Pacheco got into an argument with Luke over an unusual amount of laundry Luke had failed to put away. Luke told Pacheco he was not the biological father of the older child or the child Luke's mother had in utero. Pacheco considered this disrespectful and hit Luke once hard enough to cause a bruise. School officials called the authorities who interviewed Pacheco but he was not arrested and never went to court.

Pacheco said that Luke was previously diagnosed with depression, anxiety, ADHD, Asperger's, and a mood disorder. In 2013, Luke was diagnosed with bipolar disorder. Luke was prescribed medications to treat these conditions. Clinical notes from September 2013, however, did not indicate that Luke had been diagnosed with bipolar disorder.

Pacheco explained that on November 17, he had no intention of harming Luke. When Pacheco got up at 8:30 a.m., Luke was already awake. Pacheco described Luke's mood as "aloof." Luke went to the park close to their house about 10:00 or 10:30 a.m. Luke told Pacheco he would be at the park for three hours. Pacheco said this was fine but did not give Luke permission to go anywhere else. The first two times Pacheco went to the park to check on him Luke was still there. When Pacheco left the house a third time to pick up lunch, Luke was across the street at his friend's house with several other adolescents. Pacheco did not tell Luke to come home in front of his friends because Pacheco thought this would cause discord.

Luke returned home at 1:30 p.m., used the restroom, and went to his room for a few minutes. Luke came out of his room and asked Pacheco if he could go back to the park. Pacheco denied the request because Luke had broken his trust by going somewhere

he had no permission to be. They argued until Pacheco told Luke to go to his room and Luke complied.

According to Pacheco, Luke came out of his room throwing marbles at him. Pacheco pushed Luke to the ground and got on top of him. During the altercation, Pacheco grabbed an electrical cord attached to a fan. Pacheco asserted he did not plan to use the cord to strangle Luke, he had no plan, and he was not thinking logically about his actions. Pacheco claimed Luke threatened to kill the two younger children which triggered Pacheco to put the electrical cord around Luke's neck. Pacheco lost control of his emotions and the situation. Pacheco was angry at Luke for the comments he made about killing the children and did not disengage from the situation or try to call for help from the police or Villegas. Pacheco continued to tighten the cord until Luke's body went limp and never checked to see if Luke had a pulse.

Pacheco moved Luke's body onto his bed and covered him. He went to the kitchen to clean up the younger children and put them down for a nap. Pacheco did not know why he never called Villegas and spent the rest of the afternoon thinking about what to do. When Villegas returned home from work, Pacheco told her Luke had gone to sleep. Pacheco later took Luke's body to Sequoia National Park and returned home. When Villegas returned home from work the following day, Pacheco told her Luke never returned home from school. Villegas decided they needed to call the police. Pacheco had no explanation for why he did not initially tell Villegas or the police the truth about what happened.

During cross-examination, Pacheco admitted Luke did not immediately go limp when Pacheco first tightened the cord around his neck. Pacheco said he pulled on the electrical cord for a couple of minutes. At some point, Luke stopped fighting back and bodily fluids were coming out of his mouth. Pacheco admitted he continued to tighten the cord around Luke's neck. Pacheco acknowledged that the entire time police, family members, friends, and volunteers were searching for Luke, Pacheco lied about not

knowing where Luke's body was located. He also admitted he lied during the initial questioning by law enforcement.

### ***Rebuttal Testimony***

Dr. Walter did not observe any injuries to Luke's hands or knuckles during the autopsy. One of the prescription medications Luke took included amphetamines as part of its chemical composition, which could have accounted for the amphetamines found in Luke's system. Amphetamines are different from methamphetamines. No methamphetamine was found in Luke's system. Generally, amphetamines are a nervous system stimulant, but they have the opposite effect on children and young teenagers who have been diagnosed with a hyperactive disorder. The physical examination of Luke's body and the toxicology results did not show any indication Luke was using illicit drugs at the time of his death.

Helen Tapia was the coordinator of the after-school program at Luke's middle school. Tapia met Luke at the start of the 2013-2014 school year. The after-school program was limited to 120 students based on staff availability, so several students, including Luke, were put on a wait list. Tapia spoke with a group of students, including Luke, who were on the wait list, and told them that she would contact them in the order of their ranking on the wait list if space became available. All of the other students left, but Luke stayed behind to talk to Tapia and asked if he could stay for the after-school program. Tapia again explained the situation with the wait list, but Luke was adamant about staying. Luke told Tapia that he did not want to go home because he did not get along with his stepdad and he wanted to stay at school until his mom got home. Luke asked Tapia not to count him and to pretend he was not there.

Tapia described Luke as a positive, cheerful, and helpful boy who was always smiling. She said he was kind and polite, and always wanted to help the staff. Tapia described Luke as having a great personality. Space became available and Luke enrolled

in the program in late October 2013. Luke regularly attended the after-school program from the time he was enrolled until the day he was reported missing.

Jesus Medina was an aide at Luke's middle school. Medina provided enrichment activities and homework assistance to the students in the after-school program. Medina knew Luke through the after-school program and the sports program that Medina also ran. Medina met Luke at the beginning of the school year in August 2013. Luke was one in a group of students who were not enrolled and could not stay in the after-school program. Luke told Medina he wanted to stay because he did not get along with his stepdad and his mother was not home. Medina interacted with Luke on a regular basis when he was enrolled in the after-school program and described Luke as friendly, respectful, courteous, and helpful.

## **POTENTIAL JUROR MISCONDUCT**

### ***Introduction***

On the morning of the fourth day of trial, the court received an unsigned typewritten note from one of the jurors that said: "Your Honor, it is my understanding that we as the jury should not discuss the case, even among ourselves, until the case is finally concluded and we are given the case to come up with a verdict. If this is correct, please remind the jury of that duty." The court stated it would so instruct the jury. Neither counsel sought to voir dire the jury about why this note was given to the court.

The court instructed the jury: "I want to just remind you of one other item that I talked about earlier when I pre-instructed. Let me read this to you. [¶] As jurors you may discuss the case together only after all the evidence has been presented – all the evidence has not been presented, so you cannot discuss the case – the attorneys have completed their arguments, and I have instructed you on the law. [¶] After I tell you to begin your deliberations, then you may discuss the case, but only in the jury room and only when all twelve jurors are present."

Pacheco contends the judgment must be conditionally reversed and remanded for further proceedings because “[a] strong possibility of prejudicial juror misconduct was demonstrated by the note.” Pacheco argues the trial court failed to make an adequate inquiry concerning the potential juror misconduct and had a duty to do so. If the issue is forfeited by trial counsel’s failure to seek further inquiry by the trial court into what may have been discussed by jurors, Pacheco further argues his trial counsel was ineffective. The People respond that the issue was forfeited, and on the merits, the note failed to affirmatively allege misconduct.

### ***Analysis***

An accused has a constitutional right to a trial by an impartial jury — a jury in which no member has been improperly influenced and each member is capable and willing to decide the case solely on the evidence before it. With narrow exceptions, evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach the verdict. A jury’s impartiality may be challenged by evidence of statements made, or conduct, conditions, or events occurring either within or without the jury room, of such character as is likely to have influenced the verdict improperly. No evidence is admissible to show the actual effect of such statement, conduct, condition, or event upon a juror or concerning the mental processes by which the verdict was determined. Where a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance open to corroboration by sight, hearing, and the other senses, that suggests a likelihood one or more members of the jury were influenced by improper bias. (*In re Hamilton* (1999) 20 Cal.4th 273, 293-294 (*Hamilton*).)

When the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors, courts term the event as juror misconduct. (*Hamilton, supra*, 20 Cal.4th at p. 294.) A sitting juror’s involuntary exposure to events

outside the trial evidence, even if not misconduct, may require similar examination for probable prejudice. (*Id.* at pp. 294-295.) Such situations may include attempts by nonjurors to tamper with the jury by bribery or intimidation.

A juror who conceals relevant facts or gives false answers during voir dire examination undermines the jury selection process and commits misconduct. Misconduct by a juror, or a nonjuror's tampering contact or communication with a sitting juror, usually raises a rebuttable presumption of prejudice. (*Hamilton, supra*, 20 Cal.4th p. 295; *People v. Dykes* (2009) 46 Cal.4th 731, 809 (*Dykes*).) Whether an individual verdict must be overturned for jury misconduct or irregularity is resolved by reference to the substantial likelihood test, an objective standard. (*Hamilton, supra*, 20 Cal.4th at p. 296; *Dykes, supra*, 46 Cal.4th at p. 809.)

The trial court has discretion to determine whether to conduct an evidentiary hearing to resolve factual disputes raised by a claim of juror misconduct. The defendant, however, is not entitled to an evidentiary hearing as a matter of right. Such a hearing should only be held when the court concludes an evidentiary hearing is necessary to resolve material, disputed issues of fact. The trial court's decision whether to conduct an evidentiary hearing on juror misconduct is only reversed if the defendant can demonstrate an abuse of discretion. A trial court does not abuse its discretion in declining to conduct an evidentiary hearing when the evidence proffered in support constitutes hearsay. (*Dykes, supra*, 46 Cal.4th at pp. 809-810.) Speculation about the jury's deliberative process, for instance in possibly pressuring a sole dissenting juror to withdraw from the case, is an insufficient basis to find a jury committed misconduct. (See *People v. Maciel* (2013) 57 Cal.4th 482, 549.)

Pacheco concedes there was no detail his counsel could use to meet the necessary evidentiary standard for establishing error in a motion for new trial. Pacheco submits the trial court's failure to conduct an evidentiary hearing was, therefore, devastating. However, this argument assumes misconduct from some hypothetical discussion about



the case between two or more jurors prior to deliberations. The unsigned note from a juror handed to the court did not even establish that a conversation had taken place. It is possible a juror attempted to start a conversation and was told by other jury members not to say anything further. It is possible a group of jurors began deliberations before the end of trial. However, there is only speculation as to what may have occurred. The standard for the trial court to conduct a hearing is not based on mere speculation but upon demonstrable evidence. The trial court had no factual basis upon which to conduct a full evidentiary hearing on possible misconduct, and the court had no obligation to conduct a hearing based on the note provided by a member of the jury.

Generally, when evidence of guilt is overwhelming, the risk that exposure to extraneous information (or, in this case, possible discussion of the case prior to deliberations) will prejudice a juror is minimized. An admonition is presumed to dispel the presumption of prejudice arising from any misconduct. (*People v. Tafoya* (2007) 42 Cal.4th 147, 192-193; *People v. Zapien* (1993) 4 Cal.4th 929, 996.) In this case, the evidence against defendant was overwhelming, and included DNA as well as physical evidence that corroborated defendant's confession. The trial court gave the jury an additional admonishment not to discuss the case prior to entering into their deliberations which should have been more than adequate to overcome any potential issue concerning pre-deliberation conversations about the case.

Defendant has further argued his counsel was ineffective for failing to request a hearing. Defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Williams v. Taylor* (2000) 529 U.S. 362, 391, 394; *In re Hardy* (2007) 41 Cal.4th 977, 1018 (*Hardy*).) A reasonable probability is one sufficient

to undermine confidence in the outcome. The second question is not one of outcome determination but whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. (*Hardy, supra*, 41 Cal.4th at p. 1018.)

A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel's decisionmaking is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or, unless there simply could be no satisfactory explanation. Attorneys are not expected to engage in tactics or to file motions that are futile. (*People v. Maury* (2003) 30 Cal.4th 342, 390 [counsel did not renew a motion to change venue that had already been denied]; also see *People v. Price* (1991) 1 Cal.4th 324, 386-387.)

As noted above, the evidence of defendant's culpability was very strong, making a demonstration of prejudice difficult. Furthermore, defense counsel was not presented with any fact that the jury had committed any form of misconduct. On direct appeal, reversal of a conviction for ineffective assistance of counsel will occur only if: (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there could be no satisfactory explanation for counsel's choices. All other claims of ineffective assistance of counsel are more appropriately resolved in a habeas corpus proceeding. (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Given the absence of any record of misconduct, Pacheco's remedy is not direct appeal but a petition of habeas corpus to the trial court. We reject Pacheco's request for conditional reversal and remand to the trial court to conduct a hearing on possible, but only speculative, juror misconduct.

## **EVIDENCE OF PLANNING, DELIBERATION, AND PREMEDITATION**

Pacheco argues that “[a]lthough the evidence established that [he] willfully and intentionally caused the victim’s death by strangling him, there was no evidence of planning activity ....” Pacheco describes the evidence of a motive to kill as “weak” and only “debatable evidence of an exacting manner of killing” suggested the killing was “premeditated.” Pacheco contends the evidence of premeditation was insufficient and no reasonable trier of fact could have found the evidence proved this element of first degree murder. We disagree.

In reviewing a challenge to the sufficiency of the evidence, appellate courts review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. In cases where the People rely primarily on circumstantial evidence, the standard of review is the same. (*People v. Solomon* (2010) 49 Cal.4th 792, 811 (*Solomon*), citing *People v. Thomas* (1992) 2 Cal.4th 489, 514.) An appellate court must accept logical inferences the jury may have drawn from the evidence even if the court would have concluded otherwise. (*Solomon, supra*, 49 Cal.4th at pp. 811-812.)

The Supreme Court in *Solomon* reviewed its earlier decision in *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), a case analyzing the “three types of evidence commonly shown in cases of premeditated murder: planning activity, preexisting motive, and manner of killing.” (*Solomon, supra*, 49 Cal.4th at p. 812, citing *Anderson, supra*, 70 Cal.2d at pp. 26-27.) *Solomon* explained that these three categories provide a framework for reviewing the sufficiency of the evidence supporting findings of premeditation and deliberation. They aid reviewing courts in assessing whether the evidence supports an inference a killing resulted from preexisting reflection rather than mere unconsidered or rash impulse. *Solomon* noted that *Anderson* did not purport to establish an exhaustive list which would exclude other types of combinations of evidence

that could support a finding of premeditation and deliberation. (*Solomon, supra*, 49 Cal.4th at p. 812.)

A verdict of first degree murder based on deliberation and premeditation requires more than an intent to kill. Deliberation refers to careful weighing of considerations in forming a course of action. Premeditation means the killing was thought over in advance. (*Solomon, supra*, 49 Cal.4th at p. 812, citing *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) However, premeditation and deliberation can occur quickly. The test is reflection, not the duration of time. Thoughts can follow one another with great rapidity and cold, calculated judgment may be arrived at quickly. (*Solomon, supra*, 49 Cal.4th at p. 812, citing *People v. Sanchez* (2001) 26 Cal.4th 834, 849; and *People v. Harris* (2008) 43 Cal.4th 1269, 1286-1287.) “[A] killing resulting from preexisting reflection, of any duration, is readily distinguishable from a killing based on unconsidered or rash impulse.” (*Solomon, supra*, 49 Cal.4th at p. 813.) The process of premeditation and deliberation does not require an extended period of time. (*People v. Salazar* (2016) 63 Cal.4th 214, 245.)

Referring to the multiple homicides alleged in *Solomon*, the court referred to the prosecutor’s closing argument to the jury. The cause of death was some form of asphyxiation. The prosecutor pointed out that “either someone put a pillow over their face and suffocated them, sock down their mouth, or someone took a ligature and put it around their neck and strangled them to death, ..., *that doesn’t occur in a flick of an eye, [a] moment’s time.*” (Italics original.) (*Solomon, supra*, 49 Cal.4th at pp. 828-829.) From the manner of killing, the jury can reasonably infer that an unresisting victim who is killed indicates a calculated design to ensure death rather than an unconsidered explosion of violence. (*People v. Horning* (2004) 34 Cal.4th 871, 902-903 [victim bound and blindfolded before being shot in the brain at close range].)

Premeditation and deliberation are shown where the victim is strangled into unconsciousness before the defendant accomplishes the additional act of slashing the

victim's neck. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1293 (*Lewis*).) Premeditation and deliberation are demonstrated where the victim and defendant are in a disintegrating personal relationship, the defendant held the victim in a carotid restraint for 15 seconds after her body went limp, and the defendant fails to call 911 or seek medical assistance. Although this may not be overwhelming evidence of premeditation and deliberation, the planning activity is sufficient for premeditation even if it occurred over a short span of time. Planning may be inferred from the fact the defendant deliberately exerted pressure on the victim's neck after she went limp. A rational jury could find the defendant rapidly and coldly formed the intent to kill after she stopped struggling before he released her from the carotid restraint. Motive was shown because the defendant was jealous of the victim's relationship with another person. (*People v. Disa* (2016) 1 Cal.App.5th 654, 666 (*Disa*).)

Here, the evidence of Pacheco's premeditation and deliberation is stronger than it was in *Disa*. Viewing the evidence in the light most favorable to the jury's verdict, we note the medical examiner Dr. Walter found evidence of red finger marks on Luke's neck along with internal bleeding, which were consistent with manual pressure being applied to Luke's neck without causing strangulation. Dr. Walter explained it can take a person between 30 seconds and a minute and a half to lose consciousness when the flow of oxygen to the brain is cut off. After a loss of consciousness, there would have to be continued application of force depriving the brain of oxygenated blood for several more minutes, up to five minutes, to cause death.

Dr. Walter concluded Luke was killed by a ligature that caused asphyxiation. As with the victim in *Lewis*, Luke was first rendered unconscious by defendant before suffering a lethal act, in this case with a ligature. During cross-examination, Pacheco admitted Luke did not immediately go limp when Pacheco first tightened the fan cord around Luke's neck. Pacheco explained he pulled on the cord for a couple of minutes. At some point, Luke stopped fighting back and bodily fluids were coming out of Luke's

mouth. Pacheco admitted he continued to tighten the cord around Luke's neck.

Although Pacheco denied first placing his fingers around Luke's neck, there was physical evidence he had done this and the jury did not have to accept Pacheco's self-serving statement that he did not first render Luke unconscious before applying the fan cord ligature.<sup>6</sup> Because of its prolonged nature, strangulation as a manner of killing provides sufficient evidence of premeditation and deliberation because the killer has ample time to consider his or her actions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019-1020; *People v. Shamblin* (2015) 236 Cal.App.4th 1, 11.)

In his confession, Pacheco admitted that as he pulled on the cord, Luke was gagging and spitting up fluid that looked like mucus. Pacheco explained to investigators that he wrapped the cord around Luke's neck a second time because "what [he] was doing didn't seem to be working." Pacheco admitted he did this "I guess to kill him." Combined with Pacheco's testimony on cross-examination, the jury had very strong evidence, corroborated by Dr. Walter's autopsy findings, that Pacheco premeditated and deliberated killing Luke.

As in *Disa*, Pacheco never called 911 or sought medical attention for Luke and placed him in his bed to make it look as though he was sleeping. The jury was presented with substantial evidence that Pacheco premeditated and deliberated the use of the cord as a ligature to strangle Luke until Pacheco was sure he was dead. Furthermore, Pacheco's motive to kill Luke existed long before the incident leading to his death. Pacheco tried to isolate Luke and keep him from participating in family events. Pacheco inappropriately disciplined Luke on a prior occasion and had a hostile relationship with

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<sup>6</sup> The severity of a victim's wounds is not necessarily determinative of the defendant's intent. The condition of the victim's body, where the wounds are severe, may establish circumstantial evidence of the requisite intent. (*People v. Mincey* (1992) 2 Cal.4th 408, 433 [severity of wounds inflicted over an appreciable period of time used to establish defendant's intent to torture victim].)

Luke after the younger children were born. Pacheco had a preexisting motive to remove Luke from the family. All three elements of premeditated murder discussed in *Anderson* were present here — planning activity, preexisting motive, and the extended manner of killing. There was substantial evidence that Pacheco premeditated and deliberated Luke’s murder.

### **CALCRIM NO. 521**

Pacheco contends that CALCRIM No. 521<sup>7</sup> incorrectly described premeditation in a way that allowed the jury to make a finding of premeditation with intent to kill after the application of lethal force. Pacheco points out that premeditation is not synonymous with intent to kill. No matter how rapidly events develop, premeditation must precede the joint operation of lethal force with the intent to kill. Because the instruction states that a decision to kill must be made before “*completing the act*” causing death, the distinction between the intent to kill and deliberation by the defendant is obliterated. Pacheco further argues that for premeditation a preconceived intent to kill must have been formed before the commission of the lethal act and cannot be formed during the continuation of a single act of lethal force. Pacheco notes a previous version of this instruction required

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<sup>7</sup> In relevant part, the jury was instructed with CALCRIM No. 521 as follows:

“The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before *completing the act* that caused death. (Italics added.)

“The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate or premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.”

premeditation “before committing the act[s]” leading to death. In effect, Pacheco argues that the instruction allows the jury to find premeditation by simply acting with the intent to kill.

We agree with the People’s position that the instruction does not misstate the law.<sup>8</sup> Under the instruction, the jury must find premeditation to kill prior to killing the victim. (See *People v. Jennings* (2010) 50 Cal.4th 616, 645 [premeditation requires consideration beforehand, deliberation means formed or arrived at as a result of careful thought and weighing of considerations for and against a proposed course of action]; *People v. Halvorsen* (2007) 42 Cal.4th 379, 419 [same].) Our Supreme Court has found that by conjoining the words willful, deliberate, and premeditated in section 189 in its definition and limitation of the character of killings which constitute first degree murder, the Legislature apparently emphasized its intention to require as an element of this offense substantially more reflection than may be involved in the mere formation of specific intent to kill. (*People v. Arias* (2008) 45 Cal.4th 169, 181, citing *People v. Thomas* (1945) 25 Cal.2d 880, 889-890.) Read as a whole, the instruction requires the jury to find the defendant to have acted deliberately by carefully weighing the considerations for and against the choice, knowing the consequences, and deciding to kill. Premeditation requires consideration and does not include a rash or impulsive decision to kill. The language Pacheco challenges does not remove the need for reflection prior to deciding to kill a victim.

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<sup>8</sup> The People initially argue Pacheco forfeited this argument because his counsel failed to object to the instruction. Although we conclude otherwise, if the instruction is inaccurate and affects the substantial rights of the defendant, the claim is not subject to forfeiture and requires no objection for appellate review. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) Also, a trial court has a sua sponte duty to provide proper instructions on all of the elements of the charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311, overruled on another ground in *People v. Merritt* (2017) 2 Cal.5th 819, 830-831.)



Under the instruction, the decision to kill must be complete “before completing the act that caused death.” Because strangulation takes an extended time to accomplish, and because the jury had to find Pacheco premeditated Luke’s death before killing him, the instruction does not misdirect the jury. As we have already discussed, the length or duration of reflection is not the test by which the jury must determine whether a killing is premeditated. Strangulation is an ongoing act that can take several minutes to complete. The language challenged by Pacheco still required the jury to find premeditation prior to Pacheco completing the act, here strangulation, that killed the victim.

The medical evidence showed Pacheco had rendered Luke unconscious, but not yet dead, prior to grabbing the ligature. Pacheco’s grabbing the ligature provided the jury with uncontroverted evidence from which it could reasonably infer Pacheco had formulated the premeditated and deliberate intent to kill Luke. By his own admission, Pacheco continued to apply the ligature, redoubling his effort in the middle of strangling Luke because Pacheco believed his efforts were not working. These were the arguments the prosecutor made in closing argument to the jury as proof of Pacheco’s deliberate and premeditated intent to kill Luke.

The jury had evidence before it from which it could reasonably infer that Pacheco formed the premeditated and deliberate intent to kill Luke when he grabbed the ligature, or during the strangulation process when Pacheco decided his actions were not working and, after reflection, decided to redouble his grisly efforts. Either way, Pacheco had time to reflect on his actions and to stop before his victim was asphyxiated rather than to carry out what was obviously his plan to kill. No matter how the jury interpreted the evidence of when Pacheco deliberated and premeditated killing Luke, Luke had not yet died and Pacheco was still in the course of strangling him. This is distinguishable from a scenario, for instance, where the act leading to the victim’s death was firing a single lethal shot from a gun or plunging a knife into a vital organ. Pacheco had multiple opportunities to stop his deadly conduct and to reflect on the ongoing act that killed Luke.

CALCRIM No. 521 did not misstate the law applicable to first degree murder. The instruction did not mislead the jury or remove premeditation and deliberation as an element the jury had to find before rendering a first degree murder verdict. We find no error in the trial court's use of CALCRIM No. 521.

### **CALCRIM NO. 522**

Pacheco contends CALCRIM No. 522<sup>9</sup> as given to the jury was an incomplete statement of the law of provocation under heat of passion because the jury was not instructed on the relationship between objectively inadequate provocation that can give rise to subjective heat of passion, which he argues can negate premeditation. Pacheco adds the problem with this instruction is that it informs the jury the weight of the evidence of provocation is for it to decide, but allows the jury to disregard evidence the defendant acted without premeditation and deliberation due to provocation by the victim. The People reply that CALCRIM No. 522 is a correct statement of law and case law affirms that the further instruction sought by Pacheco is not required. We concur with the People's analysis.

The jury was also instructed with CALCRIM No. 570 which sets forth the criteria for the jury to evaluate what constitutes provocation. CALCRIM No. 570, however, discusses reducing a killing that is otherwise murder to voluntary manslaughter. Pacheco argues he is entitled to a specific instruction that murder can be reduced from first degree to second degree if the jury finds provocation and refers to CALJIC No. 8.73 which expressly states that if the jury finds that provocation was insufficient to reduce the crime

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<sup>9</sup> The jury was instructed with CALCRIM No 522 as follows:

“Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide.

“If you conclude the defendant committed murder but was provoked, consider the provocation in deciding whether the murder was first or second degree. Also, consider provocation in deciding whether the defendant committed murder or manslaughter.”

to voluntary manslaughter, it can still be considered to show whether the defendant killed with or without premeditation and deliberation. Our Supreme Court has found that CALJIC No. 8.73 is a pinpoint instruction that need not be given sua sponte by the trial court.<sup>10</sup> (*People v. Rogers* (2006) 39 Cal.4th 826, 878-880 (*Rogers*).)

Pacheco's contention that he was entitled to a more specific provocation instruction because CALCRIM No. 522 does not specifically inform the jury provocation is relevant to determine whether the defendant killed without provocation has been rejected. Citing *Rogers*, *People v. Hernandez* (2010) 183 Cal.App.4th 1327 (*Hernandez*), held that an instruction on provocation for second degree murder is a pinpoint instruction that need not be given by the trial court. (*Id.* at p. 1333.)

The court in *Hernandez* acknowledged that CALCRIM No. 522 does not expressly state provocation is relevant to premeditation and deliberation. Reading the instructions as a whole, including CALCRIM No. 521 which was given here, there is no reasonable likelihood the jury did not understand this concept. CALCRIM No. 521 instructs the jury that unless the defendant acted with premeditation and deliberation, he is guilty of second degree murder, not first degree murder. Further, a rash and impulsive decision to kill is not deliberate and premeditated. (*Hernandez, supra*, 183 Cal.App.4th at p. 1334.) *Hernandez* elaborated that provocation is not used in a technical sense peculiar to the law and courts can assume jurors are aware of the common meaning of the term.

*Hernandez* found that considering CALCRIM Nos. 521 and 522 together, jurors would understand provocation—the arousal of emotions—can give rise to a rash,

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<sup>10</sup> The People argue this argument was forfeited because defense counsel did not object to the trial court's proposal to instruct the jury with CALCRIM No. 522. The additional instruction Pacheco seeks is a pinpoint instruction. Pacheco also argues that if this issue was forfeited, his counsel was ineffective. The trial court had no obligation to give a pinpoint instruction and counsel was not ineffective for failing to request one where the instructions given by the trial court were otherwise sufficient. (*People v. Jones* (2014) 223 Cal.App.4th 995, 1001-1002 (*Jones*).) Although the issue is forfeited (*id.* at p. 1001), we further reject this issue on the merits.

impulsive decision and this in turn shows no premeditation and deliberation. The *Hernandez* court was “satisfied that, even without express instruction, the jurors understood that the existence of provocation can support the absence of premeditation and deliberation.” (*Hernandez, supra*, 183 Cal.App.4th at p. 1334.)

The defendant in *Hernandez* also asserted that CALCRIM No. 522 was deficient because it failed to instruct the jury that provocation insufficient to reduce the crime to manslaughter may nevertheless be sufficient to reduce the crime from first to second degree murder. The *Hernandez* court found this argument unavailing because CALCRIM No. 522 instructs the jury to consider provocation in deciding whether the crime was first or second degree murder and to further consider provocation in deciding whether the defendant committed murder or manslaughter. *Hernandez* concluded: “Thus, the instruction plainly states the jury should consider provocation for *both* second degree murder and manslaughter. There is nothing in the instruction that suggests the jury might have failed to fully consider the provocation evidence for second degree murder based on a rejection of the evidence for manslaughter.” (*Hernandez, supra*, 183 Cal.App.4th at p. 1335.)

Pacheco’s contention was also rejected in *Jones* which found that CALCRIM Nos. 521 and 522 are correct. *Jones* acknowledged: “a subjective test applies to provocation as a basis to reduce malice murder from the first to the second degree: it inquires whether the defendant in fact committed the act because he was provoked. The rationale is that provocation may negate the elements of premeditation, deliberateness and willfulness that are required for that degree of the crime.” (*Jones, supra*, 223 Cal.App.4th at p. 1000.) For the objective test of provocation to apply, *Jones* explained provocation must be so great that it would cause a person of average disposition to act rashly, without due deliberation. (*Jones, supra*, 223 Cal.App.4th at pp. 1000-1001.) *Jones* held CALCRIM Nos. 521 and 522 “accurately inform the jury what is required for first degree murder, and that if the defendant’s action was in fact the result of

provocation, that level of crime was not committed.” (*Jones, supra*, 223 Cal.App.4th at p. 1001.)

Both *Hernandez* and *Jones* rejected the arguments tendered by Pacheco that he was entitled to further instruction on what constituted the provocation necessary for the jury to reduce his culpability from first to second degree murder. We agree with the holding of these cases and apply it here.

## **ALLEGED PROSECUTORIAL MISCONDUCT**

### ***Introduction***

Pacheco contends the prosecutor improperly argued about his alleged prior abuse of Luke. Pacheco reiterates his earlier argument regarding the jury instructions that the prosecutor improperly referred to Pacheco’s decision to kill Luke “before completing the act that caused death.” Pacheco contends this equated mere intent to kill with premeditation which he argues is legally wrong.<sup>11</sup> We find no misconduct by the prosecutor.

### ***Closing Argument***

During closing statements to the jury, the prosecutor referred to the prior abuse Luke had suffered from Pacheco. The prosecutor said Pacheco had hurt Luke and wanted him gone. The prosecutor argued that strangling was unique, unlike a shooting or stabbing, because it is up close and personal. “You’re literally squeezing the life of another human being with your own hands.” The prosecutor noted Pacheco would have felt Luke kicking and struggling beneath him to escape Pacheco’s grasp. Pacheco would have heard Luke struggling to breathe, but he still pulled on the cord even after he saw fluids coming out of Luke’s mouth.

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<sup>11</sup> The People again argue that defense counsel did not object to the trial court’s instructions to the jury so the issue is forfeited. Pacheco contends trial counsel was ineffective for failing to object to the court’s instruction. Because we find no prosecutorial misconduct, we do not reach these contentions.

Using Pacheco's confession, the prosecutor told the jury that Pacheco sensed Luke's body go limp beneath him and still pulled the cord until Luke stopped breathing. This did not occur suddenly; it took minutes, not seconds. The prosecutor asked the jury if Pacheco was thinking about what he was doing in those minutes and concluded, "[o]f course he was." The prosecutor noted that at one point in his confession, Pacheco claimed he stopped strangling Luke after he initially passed out. The prosecutor asked the jury not to believe that statement.

The prosecutor stated the "evidence leaves no room for any explanation other than that killing was intentional, that this killing was willful, deliberate, and premeditated." The prosecutor further pointed out that according to Dr. Walter, if Pacheco had stopped strangling Luke after he passed out, he would still be here today because he would have revived. The prosecutor argued that Luke had already gotten Pacheco in trouble with Villegas once and if Pacheco let Luke live, he would not get away with it again.

The prosecutor told the jury that premeditation does not require any specific amount of time and Pacheco could form intent in a split second. The prosecutor argued Pacheco formed the intent to kill when he had Luke pinned on the ground and was enraged because he was "being disrespected by this teenager." The prosecutor added that Pacheco's intent to kill was demonstrated when he reached out and grabbed the fan cord, hooked it under Luke's neck, and began to pull. "And he confirmed his intent to kill when he looped the cord so that it completely encircled [Luke's] neck because, in his words, what he was doing, quote, wasn't working. His intent to kill continued for the entire time that he pulled on that cord, even after [Luke] lost consciousness, until [he] stopped breathing, until his heart stopped beating. That's intent to kill. That's willfulness, deliberation, and premeditation." The prosecutor invited the jury to look at the premeditation instruction which states that the defendant acted with premeditation if he "decided to kill before completing the act that caused death."

The prosecutor described Pacheco's actions after killing Luke as a coverup that confirmed what was in defendant's mind and what his intent was all along. The prosecutor read to the jury the instruction on false and misleading statements. He also talked about Pacheco trying to hide evidence and that such conduct may show he was aware of his guilt. The defense attorney argued that Pacheco's conduct was voluntary manslaughter, but as a compromise the jury could reach a verdict of second degree murder. On rebuttal, the prosecutor reiterated his earlier argument that Pacheco had time to cool down after Luke passed out and posed no threat but Pacheco made the conscious decision to continue strangling and pulled even more when he saw fluids coming out of Luke's mouth.

### ***General Principles***

A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct. Reversal under the federal Constitution is necessary only when these methods infect the trial with such unfairness as to make the resulting conviction a denial of due process. (*People v. Salcido* (2008) 44 Cal.4th 93, 152 (*Salcido*), citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Misstating the law or facts in a case is a form of prosecutorial misconduct. (*People v. Boyette* (2002) 29 Cal.4th 381, 435 (*Boyette*).)

A prosecutor's conduct not rising to the level of a constitutional violation is misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that can be drawn from the evidence. (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.) The prosecutor may state matters not in evidence but which are common knowledge or are illustrations drawn from common experience, history, or literature. In vigorously arguing his or her case, a prosecutor is not limited to Chesterfieldian politeness and may even use appropriate epithets as long as

the prosecutor has made fair comment on the evidence. (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952; see *People v. Clark* (2011) 52 Cal.4th 856, 962.)

***Argument Concerning Pacheco's Prior Discipline of Luke***

Pacheco argues it was misconduct for the prosecutor to argue the jury could consider evidence of his prior physical abuse of Luke as evidence of premeditation because it went beyond the limited purpose for which the evidence was admitted. The jury, however, was instructed with CALCRIM No. 375 that evidence of defendant's battery of Luke in 2010 had to be proved first by a preponderance of the evidence and it was limited to whether the defendant acted with intent to kill or had a motive to commit the alleged offense. The instruction is not a misstatement of law. (Generally see *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-394.) We agree with the People that the prosecutor's argument was well within the confines of the instruction. The prosecutor asked the jury to consider this evidence for motive and intent to kill. Under *Anderson*, motive is properly considered on the issue of premeditation. (*Anderson, supra*, 70 Cal.2d at pp. 26-27.)

***Argument on Law of Premeditation***

Pacheco asserts the prosecutor misstated the law on premeditation by stating it could be formed after Pacheco began but before completing the act causing Luke's death. As discussed *ante*, this is not a misstatement of law and the argument that the prosecutor misstated the law on this ground must be rejected.

***Argument on Acts After the Homicide***

Pacheco claims the prosecutor misstated the law on premeditation by referring to his conduct after Luke was dead. We find in the next section that such evidence was admissible and incorporate our argument by reference here. The prosecutor did not misstate the law on this ground and defendant's argument to the contrary is rejected.

We conclude there was no misconduct by the prosecutor during his closing arguments to the jury.



## **PACHECO'S CONDUCT AFTER THE KILLING**

### ***Introduction***

During deliberation, a jury spokesperson informed the court that the jury was stuck on the question of premeditation and sought the court's clarification. The court stated the answer came from CALCRIM No. 521 and read from the instruction: "That the defendant acted with premeditation if he or she decided to kill before completing the acts that caused death." The court added the next paragraph talks "about the length of time and talking about deliberation and premeditation." The court referred the jury to consider the instruction. There was a further question about the speed of the video of Pacheco's confession and whether the jury could also use the transcript.

The jury later sent a note to the court asking: "After the murder was complete—does covering up evidence & lying about the murder constitute an upgrade from murder 2 to murder 1?" The trial court prepared a statement in response to which the parties concurred. The court advised the jury: "It is the state of mind of the defendant at the time of the killing that determines whether it is first or second degree murder, in answer to your specific question on that issue. What the defendant does afterwards is evidence that can be considered by you to determine the defendant's state of mind when the killing occurred."

A juror asked the court to read the second part again. The court responded: "What the defendant does afterwards, which in this case would be the attempts to cover up and disposing of the body and then the lying, that is evidence that can be considered by you when you determine the defendant's state of mind when the killing occurred, when he strangled Luke."

Pacheco argues the trial court's response instructions on consciousness of guilt were improper as they emphasized improper evidence of what he did after the killing and

the only issue was his state of mind at the time prior to the killing.<sup>12</sup> Pacheco concedes that because the consciousness of guilt instructions were superfluous, they were arguably harmless. Pacheco contends that the court's response to the jury's question during what he calls an impasse was incorrect because it allowed the jury to consider evidence of awareness, or consciousness, of guilt to support an inference of premeditation. Pacheco argues that in effect the court misdirected the jury to a verdict on first degree murder. According to Pacheco, the consciousness of guilt instructions compounded the trial court's instructional error.

The People reply that evidence of events after a killing can illuminate the defendant's intent to kill and premeditation.<sup>13</sup> We find that read as a whole, the instructions given to the jury were legally accurate and did not misdirect the jury on the question of whether Pacheco premeditated the killing. Further, to the extent there was error in the trial court's instructions, given the overwhelming evidence that Pacheco premeditated the killing, any error was harmless beyond a reasonable doubt.

### ***Analysis***

There are two aspects to Pacheco's argument. The first is that consciousness of guilt does not illuminate the issue of intent vis-à-vis the degree of murder. The second is that evidence of conduct after the killing of a victim is always irrelevant to whether the perpetrator premeditated the crime.

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<sup>12</sup> The jury was instructed with CALCRIM No. 371 concerning general consciousness of guilt, including hiding evidence and creating false testimony as showing the defendant was aware of his guilt, and CALCRIM No. 362 concerning making false or misleading statements before trial as indicating the defendant was aware of his guilt. Both instructions stated that such an attempt cannot prove guilt by itself.

<sup>13</sup> The People again argue that defense counsel did not object to the trial court's instructions to the jury so the issue is forfeited. Pacheco contends trial counsel was ineffective for failing to object to the court's instruction in response to the jury's note. Because we find any error in the instruction harmless, we do not reach these contentions.

Pacheco correctly explains that the Supreme Court has regularly rejected claims that consciousness of guilt instructions permit the jury to draw irrational inferences concerning the defendant's mental state. The Supreme Court has explained that consciousness of guilt means and is understood by jurors to be consciousness of some wrongdoing rather than consciousness of committing the specific offense charged. Such instructions do not endorse the prosecution's theory or lessen the burden of proof. (See *People v. Crandell* (1988) 46 Cal.3d 833, 871, disapproved on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365 (*Crandell*); *Boyette, supra*, 29 Cal.4th at pp. 438-439; *People v. Hughes* (2002) 27 Cal.4th 287, 348; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579.)

*Crandell* noted that consciousness of guilt instructions "do not address the defendant's mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard thereto." (*Crandell, supra*, 46 Cal.3d at p. 871.) In *People v. Arias* (1996) 13 Cal.4th 92, 141-142 (*Arias*), the defendant made false pretrial statements about reflexively stabbing the victim when someone put their hand on his shoulder and denied he intentionally stabbed the victim. The testimony of an eyewitness corroborated the victim's placing a hand on the defendant's shoulder, but the eyewitness added that defendant grabbed the hand to pull the victim toward him before stabbing him. The defendant challenged the use of an instruction concerning false statements as showing consciousness of guilt similar to CALCRIM No. 362 used here. (*Id.* at p. 141.) *Arias* found the false statements were, in effect, attempts by the defendant to deny he intended to kill the victim and if the jury found the statements to be lies, they would logically suggest the defendant did intend to kill and he therefore harbored a consciousness of guilt.

*Arias* further found the instruction related only to consciousness of guilt so a reasonable jury would understand the instruction to refer to consciousness of some wrongdoing, not consciousness of every element of the charged offense. *Arias*

reaffirmed the court's earlier statement in *Crandell* that the instruction does not address defendant's mental state at the time of the offense and does not direct or compel the drawing of impermissible inferences in regard thereto.<sup>14</sup> (*Arias, supra*, 13 Cal.4th at p. 142.) Pacheco notes that pursuant to the *Arias* case, his false statement about not using his hands to initially strangle Luke was a statement from which the jury could reasonably infer he made a false statement. Pacheco argues, however, that this false statement did not support an inference that he premeditated killing Luke.

We disagree with Pacheco's assessment of whether his false statement regarding the use of his hands to initially strangle Luke but not kill him had no bearing on premeditation. Pacheco asserted that he acted rashly and with provocation from Luke. Pacheco denied premeditating the killing. By denying that he grabbed Luke's neck with his hands, Pacheco was trying to make his act of grabbing the fan cord appear to be spontaneous. The autopsy showed Pacheco's act of choking Luke with his hands did not kill Luke and that he died from ligature asphyxiation. From Pacheco's denial that he first choked Luke with his hands, the jury could reasonably infer that Pacheco was aware the strangulation would appear to be more prolonged and further he had formed the premeditated intent to stop choking Luke with just his hands in order to move on to a more effective means of killing him. The jury could further reasonably infer that Pacheco wanted investigators to believe he immediately used the ligature so it would appear more likely that he acted rashly from undeliberated rage.

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<sup>14</sup> The comment in *Crandell* and *Arias* that consciousness of guilt instructions have no bearing on the defendant's mental state appears to mean that such instructions do not intrude or supersede other correctly given instructions concerning a defendant's mental state when committing a crime. Consciousness of guilt instructions have a neutral effect on the jury's consideration of a defendant's mental state. *Arias* makes clear that consciousness of guilt can be considered on the question of premeditation if a defendant's conduct after killing a victim has some discernable connection to his or her mental state before the killing.

In *People v. Perez* (1992) 2 Cal.4th 1117, 1128 (*Perez*), the California Supreme Court analyzed whether evidence of a defendant's conduct after killing the victim was relevant to the issue of premeditation. Reviewing its decision in *Anderson, supra*, 70 Cal.2d 15, the Supreme Court noted in *Perez* there was no evidence or eyewitnesses to the murder and the defendant did not testify or confess. There was evidence of the defendant's subsequent efforts to suppress the crime. On that bare record, the *Anderson* court concluded the evidence was insufficient to demonstrate a premeditated and deliberate murder and the crime was reduced to second degree murder. (*Ibid.*)

*Perez* then reviewed *People v. Wharton* (1991) 53 Cal.3d 522 (*Wharton*), a case where the defendant killed the woman with whom he had been living, stuffed her body in a barrel, and left it in the apartment. The autopsy showed the victim was struck three times on the head with a blunt instrument, likely a hammer. A hammer was found hidden under a mattress, and one was missing from a toolbox in the garage. The defendant confessed, claiming he killed the victim during an uncontrolled rage. *Perez* noted that *Wharton* found sufficient evidence of premeditation and deliberation because the defendant either retrieved the hammer in advance, or became angry during the argument and retrieved it from the garage to kill the victim while she slept. There was, therefore, evidence of planning and motive. (*Perez, supra*, 2 Cal.4th at p. 1228, citing *Wharton, supra*, 53 Cal.3d at p. 548.)

In *Perez*, the defendant obtained from the kitchen a steak knife used to kill the victim, indicating planning activity. There was a plausible motive from the fact the victim was acquainted with the defendant. The manner of killing was indicative of premeditation because the first knife used in the attack broke and the defendant went searching for a second knife. (*Perez, supra*, 2 Cal.4th at p. 1129.) The second series of knife wounds, however, were apparently post mortem and in nonvital areas of the victim's body. It was unapparent, however, that the victim was already dead. She had been knocked to the ground and was bleeding to death. The jury could reasonably infer

that the post mortem wounds were inflicted after defendant had broken the first knife and obtained the second knife to inflict further wounds. It was difficult to describe the defendant's conduct as a rash or unconsidered impulse. (*Perez, supra*, 2 Cal.4th at p. 1127.) Even if the first knife attack was spontaneous, the defendant had time to reflect on his actions when the knife broke and his search for a second knife showed an intent to kill. The *Perez* court concluded its evidence of premeditation was stronger than such evidence in *Wharton*. (*Perez, supra*, 2 Cal.4th at p. 1129.)

The phases Pacheco went through in strangling Luke are very similar to the sequence of stabbings described in *Perez*. Although it is not certain precisely when Luke died, Pacheco admitted he readjusted the ligature because it did not appear to him that his efforts were working. Pacheco handled Luke's body to make it appear he was sleeping in his bed before he later disposed of it in Sequoia National Park. Pacheco coolly acted as though nothing had happened before rationally and carefully covering up physical evidence of his crime. Pacheco denied knowing where Luke was and pretended to Villegas that he had gone to school although he had been dead since the prior afternoon. Pacheco denied knowledge of what happened to Luke as Villegas, family members, friends, and investigators searched for him. Pacheco's conduct after the killing could properly be considered by the jury on the question of whether he had premeditated Luke's homicide.

The instruction given to the jury in response to its note to the court was simple, stating: "It is the state of mind of the defendant at the time of the killing that determines whether it is first or second degree murder, in answer to your specific question on that issue. What the defendant does afterwards is evidence that can be considered by you to determine the defendant's state of mind when the killing occurred." We find no error in this statement which emphasized in each sentence that the jury had to examine only evidence of Pacheco's state of mind when the killing occurred. Under *Arias* and *Perez*, evidence of a defendant's conduct after committing homicide can be relevant to

evaluating his or her state of mind and whether there was premeditation. The original instructions on premeditation and deliberation were correct. Also, the trial court reread relevant portions of CALCRIM No. 521 to the jury when it initially sought clarification of the definition of premeditation. This instruction did not contradict or undermine the trial court's original instructions.

We are somewhat more concerned, however, with the trial court's further instruction after a juror asked the court to reread the second part of the instruction. Rather than limiting its remarks to just the second sentence of the instruction, the court said: "What the defendant does afterwards, which in this case would be the attempts to cover up and disposing of the body and then the lying, that is evidence that can be considered by you when you determine the defendant's state of mind when the killing occurred, when he strangled Luke."

Pointing to specific evidence in the case is a stronger advisement to the jury than merely explaining that it was to decide what evidence had a bearing on Pacheco's state of mind. The instruction still emphasizes that the jury had to focus on Pacheco's mental state when the killing occurred. Although this second instruction may be problematic, we do not have to decide whether or not it was error and will assume *arguendo* the court erred in referring to specific evidence in the case. A single instruction to the jury may not be judged in artificial isolation but must be viewed in the context of the overall charge. (*Boyde v. California* (1990) 494 U.S. 370, 378.) The court's instructions on premeditation and deliberation were correct. If there was error in the instruction, it did not have the effect of shifting the burden of persuasion to the defendant and thereby violate Pacheco's due process rights under the Fourteenth Amendment. (See *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-525.)

Assuming the instruction is error because it could have affected how the jury evaluated Pacheco's mental state, we find federal due process implicated and follow the beyond-a-reasonable-doubt standard for assessing prejudice in *Chapman v. California*

(1967) 386 U.S. 18. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; *People v. Chavez* (2004) 118 Cal.App.4th 379, 387 (*Chavez*).) In assessing prejudice, we consider if it appears beyond a reasonable doubt that the asserted error did not contribute to the verdict. (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73, fn. 4.) We must find the error unimportant in relation to everything else the jury considered on the issue in question. (*Chavez*, *supra*, 118 Cal.App.4th at p. 387.)

Although he argues otherwise, the evidence that Pacheco premeditated Luke's homicide is particularly strong. Pacheco had physically hurt Luke while disciplining him. Pacheco disliked Luke and tried to keep him from or to marginalize Luke's participation in family events. Luke had a long-standing fear of Pacheco, often avoiding him. Luke appeared desperate to get into an after-school program that was too crowded to take him at first. Luke stayed with a friend across the street and would spend extended time in a nearby park. Luke appeared to avoid Pacheco as much as possible.

Dr. Walter found that the finger marks and internal bleeding from Luke's neck did not kill him but may have left him unconscious. It was the ligature applied to Luke's neck for up to five minutes that caused death by asphyxiation. Pacheco had to stop strangling Luke with his hands and consciously decide to switch over to the ligature which indicates a premeditated and deliberate intent to kill. Pacheco made statements during his confession and at trial that Luke provoked him by threatening to kill the younger children and Pacheco had no plan to kill Luke but became enraged. These self-serving statements, however, were undermined by Pacheco's admission that after applying the cord to Luke's neck, it did not appear to be working, and he adjusted the ligature and continued strangling Luke until he was certain Luke was dead.

Aside from any evidence the jury may have considered of Pacheco's conduct after the homicide, the only evidence that Pacheco acted rashly out of unconsidered anger were his self-serving statements. The medical autopsy evidence and Pacheco's own confession



show a premeditated and deliberate effort by him to murder Luke. We find that any instructional error in the trial court's two instructions to the jury following their note to the court was harmless beyond a reasonable doubt.

### **CUMULATIVE ERROR**

Pacheco asserts the combination of errors constituted cumulative error necessitating reversal. Where, as here, a defendant's assignments of error are rejected, there is no cumulative error. Assuming there was error in the trial court's additional instructions to the jury during deliberations, this was harmless. There was, therefore, no prejudicial error to accumulate. (*People v. Hensley* (2014) 59 Cal.4th 788, 818; see *People v. Jenkins* (2000) 22 Cal.4th 900, 1056; *People v. Bradford* (1997) 15 Cal.4th 1229, 1382; *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068.)

### **DISPOSITION**

The judgment is affirmed.

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SNAUFFER, J.

WE CONCUR:

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DETJEN, Acting P.J.

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FRANSON, J.